

NOTICE OF BOARD OF REGENTS' MEETING

Date: **November 19, 2009**

Board business not completed on this day will be taken up on another day and time announced at the conclusion of the meeting.

Time: **9:00 a.m.**

Place: **Leeward Community College
Campus Center Student Lounge
96-045 Ala Ike Street
Pearl City, Hawai'i 96782**

AGENDA

I. Call Meeting to Order

II. Approval of Meeting Minutes of October 15, 2009

III. Public Comment Period: *Individuals may orally testify on items on this agenda either during the Public Comment Period or when the agenda item is taken up by the Board. Please call the Board office prior to the meeting or notify the Secretary of the Board at the meeting site. Written testimony is also accepted. Testifiers are requested to limit their testimony to three (3) minutes.*

IV. Report of the President

V. Report of the University of Hawai'i Foundation

VI. Items for Board Action – Part A

UH Mānoa

1. Approval of Establishment of a Bachelor of Science Degree in Computer Engineering, College of Engineering
2. Approval of Established Status for the Bachelor of Science Degree in Tropical Plant and Soil Sciences, College of Tropical Agriculture and Human Resources
3. Approval of Established Status for the Bachelor of Science Degree in Natural Resources & Environmental Management
4. Approval of Memorandum of Agreement between UHM and the City and County of Honolulu for the Student U-Pass/Transportation Fee

UH System

5. Quarterly Endowment Fund Performance Report by Third Party Monitor (*information only*)

VII. Executive Session (*closed to the public*):

Personnel Actions Related to the Following Positions: (*To discuss the following personnel matters pursuant to HRS §92-5(a)(2)*)

- a. Approval of Award of the Regents Medal of Distinction to Mr. William Kwai-Fong Yap
- b. Approval of Emeritus Titles: Barry John Baker, UH Mānoa; John Gersting and Judith Gersting, UH Hilo
- c. Update on Executive Searches

VII. Executive Session (*closed to the public*) [continued]:

Legal and Real Estate Matters: (*To consult with attorneys on powers, immunities, and liabilities pursuant to HRS §92-5(a)(4); To consider negotiations concerning acquisition of public property pursuant to HRS §92-5(a)(3)*)

- d. Approval of the Cultural Resources Management Plan ("CRMP") and Natural Resources Management Plan ("NRMP") for UH's Management Areas on Mauna Kea
- e. Approval of Amendment to Service Order to RCUH on UH West O'ahu
- f. Approval of Authorization to Process Real Property Documents for UH West O'ahu
- g. Status of Land Acquisition (information only)
- h. Approval of Hawai'i Community College Palamanui Long Range Development Plan
- i. Status Report on Campus Developments (information only)
- j. Status of Ongoing Litigations

Collective Bargaining: (*To discuss authority of persons conducting labor negotiations and conducting negotiations pursuant to HRS §92-5(a)(3)*)

- k. Collective Bargaining

Private Donations: (*To consider matters relating to the solicitation and acceptance of private donations, pursuant to Hrs §92-5(7)*)

- l. Acceptance of Anonymous Gift and Naming Approval to Establish the Dr. Alfred A. Yee Visiting Professorship in Civil and Environmental Engineering, College of Engineering, UH Mānoa

VIII. Items for Board Action – Part B

University of Hawai'i Mānoa

- 6. Approval of Award of the Regents Medal of Distinction to Mr. William Kwai-Fong Yap
- 7. Acceptance of Anonymous Gift and Naming Approval to Establish the Dr. Alfred A. Yee Visiting Professorship in Civil and Environmental Engineering, College of Engineering, UH Mānoa

University of Hawai'i Hilo

- 8. Approval of the Cultural Resources Management Plan ("CRMP") and Natural Resources Management Plan ("NRMP") for UH's Management Areas on Mauna Kea

University of Hawai'i West O'ahu

- 9. Approval of Amendment to Service Order to RCUH on UH West O'ahu
- 10. Approval of Authorization to Process Real Property Documents for UH West O'ahu

University of Hawai'i Community Colleges

- 11. Approval of Hawai'i Community College Palamanui Long Range Development Plan

IX. Acceptance and Approval of Gifts, Grants and Contracts [Attachments A-1, A-2, A-3]

X. Approval of Personnel Actions [Attachments B-1, B-2]

XI. Announcements

Next Meeting:
January 28, 2010
Maui Community College

XII. Adjournment

Persons with disabilities who may need an accommodation, please call the Board of Regents Office

Extramural Sponsor Awards Monthly Summary September 30, 2009

<u>Type</u>	<u>Count</u>	<u>Amount</u>
Research	165	\$47,917,183
Non-Research	93	\$29,307,735
<u>TOTAL</u>	<u>258</u>	<u>\$77,224,918</u>

Note: The listing of the awards at:

<http://www.ors.hawaii.edu/bor-reports.asp>

Consent Agenda for Indemnity Provisions Attachment

Indemnity Provision – Agreement between the University of Hawai'i (UH) and the Smithsonian Astrophysical Observatory

The Smithsonian Astrophysical Observatory (SAO) has issued a subaward to UH in the amount of \$15,000.00 from its prime agreement with the National Aeronautics and Space Administration (NASA) to conduct a study entitled, "Local versus Large Scale: The Active Galaxy Population in High-Redshift Clusters" (hereafter referred to as "Project"). The SAO is a research institute of the Smithsonian Institution.

The current period of performance of the Project is from July 2, 2009 to July 1, 2011.

Dr. Roy Gal (hereafter "PI"), a member of the UH graduate faculty and affiliated with the UH Institute for Astronomy (IfA), will lead the Project. Under this Project, the PI will use data gathered from X-ray observations of the most luminous active galaxies (hosting massive black holes) and the data from a complementary survey to find less luminous black holes and galaxies that are rapidly forming stars. The PI will use the data to examine the distribution of these objects in one of the largest structures in the universe, as seen when the Universe was 6.3 billion years old. The PI will determine the distribution of these active galaxies across the entire supercluster, quantify the properties of the galaxies, and examine how their properties depend on the environment in which they reside. The data will be compared to other observations of a similar structure as seen when the Universe was 5.3 billion years old and this comparison will allow the PI to attempt to map the time evolution of these objects.

Under this award, the PI will analyze data provided by SAO. This data will be transmitted over the Internet from an orbiting x-ray telescope on a space-borne observatory, traveling about a thousand miles above the earth.

The PI or his graduate assistant may travel to the Big Island for the purpose of conducting observations with telescopes on Mauna Kea. These observations need to be planned and proposed to the UH Telescope Time Allocation Committee. The PI will decide whether to initiate this process after he completes the analysis of data provided by SAO.

If observation time on the Mauna Kea telescope is applied for and approved, the PI's primary role will be to determine and control the observational parameters that will maximize the scientific usefulness of the data to be obtained from the observation. The PI will not operate the telescope. A trained technician will perform this task. Interactions between the PI and the technician and other staff supporting the telescopes are limited to oral and electronic communications. According to the IfA, no technician or other staff supporting the telescopes at Mauna Kea has ever suffered any harm or injury from the types of interactions anticipated in the performance of this Project.

The subaward agreement between UH and SAO contains a provision which reads as follows:

D. General Release

Award Recipients are responsible for all actions taken or not taken in the performance of the activities under this Award, and the Smithsonian Institution and NASA expressly disclaim any responsibility to any third party therefor. Further, to the extent allowable by law, the Award Recipient agrees to hold both the Smithsonian and NASA harmless from,

and to accept all responsibility for, any harm suffered by anyone arising out of actions of the Award Recipient or its employees, agents, and representatives if visiting SAO.

As stated in the contract, UH will be undertaking the work under this award as an independent contractor, not as an employee of the Smithsonian Institution or NASA. In addition, UH is insured against the types of risk that might be incurred under this award, such as an accident while traveling to Mauna Kea.

As described, the PI or his graduate assistant paid under the award may travel to Mauna Kea observatories to acquire data for the Project. All other work will be performed at the Institute for Astronomy, located at 2680 Woodlawn Drive and part of the UH Manoa Campus. No employee, agent or representative of the award recipient (UH) will travel to SAO in Cambridge, Massachusetts under this award. Thus, “harm” suffered during such visits will not occur.

Another provision in the subaward agreement between UH and SAO states:

B. Indemnification

The Award Recipient agrees not to make any claim against the U.S. Government, NASA, or the Smithsonian Institution, its Regents, directors, officers, employees, volunteers, licensees, representatives and agents, with respect to activities under this Award for the injury or death of its employees or of contractor or subcontractor employees, or to the loss of its property or that of its contractors and subcontractors, whether such injury, death, damage or loss arises through negligence or otherwise, except in the case of willful misconduct.

Although the title of this clause is “indemnification,” this provision is an agreement not to file a claim against the U.S. Government, NASA, or the Smithsonian Institution. Since, with respect to the activities to be performed under this award, UH does not envision a circumstance under which it would want to bring a claim against any of these entities for the injury or death of UH employees or to the loss of its property, and since UH will not hire contractors or subcontractors under this award, we do not believe that this provision is problematic.

If a Mauna Kea telescope technician files a claim against the U.S. Government, NASA, or the Smithsonian Institution, then under this provision, UH might be required to indemnify the U.S. Government, NASA, or the Smithsonian Institution. However, for reasons detailed above, it is extremely unlikely that a technician or other support staff will incur injury or death from any activities performed under this award, or that a claim would be filed against the U.S. Government, NASA, or the Smithsonian Institution. According to the IfA, no such claim has ever been filed against a Mauna Kea observer. For this award, it is highly unlikely that the indemnity clause will be invoked.

For these reasons, it is requested that the Board of Regents approve the acceptance of the two provisions in the subaward agreement between UH and SAO.



UNIVERSITY
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SYSTEM

Office of the Vice President for Research

MEMORANDUM

November 6, 2009

TO: M.R.C. Greenwood
President

Howard Todo
Vice President for Budget and Finance/Chief Financial Officer

Darolyn Lendio
Vice President for Legal Affairs and University General Counsel

FROM: James R. Gaines
Vice-President for Research

SUBJECT: APPROVAL OF INDEMNITY PROVISION — AGREEMENT BETWEEN THE
UNIVERSITY OF HAWAII AND THE EUROPEAN MOLECULAR BIOLOGY
LABORATORY

In accordance with Hawaii Revised Statutes Section 304A-110 and Board of Regents Policy Section 8-1, it is requested that you approve the placement of the attached Indemnity Provision between the University of Hawaii and the European Molecular Biology Laboratory in the consent agenda section for the November 2009 Board of Regents meeting for the purpose of securing Board approval.

Attachment

Approved/Disapproved: _____
President Date

Approved/Disapproved: _____
Vice-President for Budget and Finance/CFO Date

Approved/Disapproved: _____
Vice-President for Legal Affairs and University General Counsel Date

2800 Woodlawn Drive, Mānoa Innovation Center
Honolulu, Hawai'i 96822
Telephone: (808) 956-7490
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**Consent Agenda for Indemnity Provisions
Attachment**

Indemnity Provision between the University of Hawaii (UH) and the European Molecular Biology Laboratory (EMBL)

Background Information: Dr. Marla Berry, Professor and Chair of the Department of Cell and Molecular Biology in JABSOM, is involved in research to study selenoprotein mRNA mechanism of decay. To advance this research, she visited EMBL this past August and September to spend 2 weeks in the laboratory of scientists there who created plasmid DNA constructs, specifically pCI-flag (empty plasmid), eIF4a3-flag-pCI, eIF4a3-116-flag-pCI, eIF4a3-154-flag-pCI, eIF4a3-188-flag-pCI, eIF4a3-401-flag-pCI, MAGOH-flag-pCI, Y14-flag-pCI, barentz-flag-pCI, hereafter, “Material”, as defined in Annex 1. These are research tools necessary for Dr. Berry’s research in this area. She has requested the Material from EMBL so that she may use them at UH where she will introduce the Material from EMBL into cells in culture to produce corresponding RNA-binding proteins that will enable her to study the degradation of selenoprotein mRNAs. EMBL, however, will only transfer the Material under their Material Transfer Agreement which contains an indemnity provision requiring Board of Regents’ approval.

Indemnity Provision in the Provider’s Material Transfer Agreement: In the provider’s Material Transfer Agreement, UH is required to hold harmless the EMBL and its researchers, as provided below:

ARTICLE 5.2:

“Recipient assumes all and any liability for damages, which may arise from the use of the Material, its storage or disposal. The Recipient shall hold harmless the EMBL and its researcher/s for any loss, claim or demand, which could be raised by the Recipient, or made against the Recipient by any other party, due to, or arising from, the use of the Material by the Recipient, except to the extent caused by the gross negligence or willful misconduct of EMBL”

Furthermore, Article 5.1 of the MTA (Warranties and Liability) states that “Any Material provided to this MTA is understood to be experimental in nature. It may have hazardous properties. The EMBL makes no representations and extends no warranties of, any kind, express or implied, as to the fitness of the Material for a particular purpose, or that the use of the Material will not infringe any patent, copyright, trademark, or other proprietary rights of a third party.”

Despite OTTED’s request for alternate liability language that does not include the hold harmless provision, EMBL replied that it is unable to make any changes to its agreement and it must be accepted, as is, or they are unable to provide the Material.

Analysis: To address potential hazards of the material, the disclaimer language in Article 5.1 is standard language found in MTAs, including OTTED’s standard MTA, regardless of the material or actual hazards. Dr. Berry has provided assurance that there is virtually no health and safety risk associated with the Material that we will be receiving from EMBL. In addition, she has indicated that “the Material we will be obtaining from EMBL expresses normal human proteins that are involved in RNA metabolism. The likelihood of any damage, injury or liability is extremely minimal. The DNA is not infectious, and encodes normal cellular proteins that have not been implicated in any disease. The probability of any health or safety risk from this indemnity is extremely low.”

Furthermore, UH staff who will work with the Material are trained on proper use, storage and disposal of the Material. This will assure that they will be able to safely use, storage and dispose of the Material.

Addressing the statement in Article 5.2, which provides as follows:

The Recipient shall hold harmless the EMBL and its researcher/s for any loss, claim or demand, which could be raised by the Recipient, or made against the Recipient by any other party, due to, or arising from, the use of the Material by the Recipient

It is unlikely that UH, the Recipient, will make any claims and since no third persons or parties will be given access to the Material, it is also unlikely that “any other party” will suffer any loss, claim or make demand against UH, the Recipient. For these reasons, Dr. Berry, the Principal Investigator on the project, believes it unlikely that any person would make a claim to trigger this provision.

With regards to the provision in paragraph 5.1, wherein EMBL states, “EMBL makes no representations and extends no warranties of, any kind, express or implied, as to the fitness of the Material for a particular purpose, or that the use of the Material will not infringe any patent, copyright, trademark, or other proprietary rights of a third party”, read broadly, this suggests that the use of the Material “might” infringe on someone else’s patent rights.

In the “Definitions” section, “Material” is defined as “regarding the inherent intellectual property rights is and remains the exclusive property of EMBL, comprises the Original Material, any Progeny, Unmodified Derivatives, the Original Material contained in Modifications and proprietary information concerning the Original Material.”

This paragraph suggests that the Material is the exclusive property of EMBL. We tried to get this paragraph clarified but EMBL did not oblige.

If the Material is the exclusive property of EMBL, then the risk from patent infringement is remote. Since Dr. Berry went to EMBL to train with them because they “created” the Material, it appears that we can make the assumption that the Material is the property of EMBL.

EMBL’s Material is critical for Dr. Berry’s research and necessary for work being proposed under a grant application that she is currently preparing. EMBL is the only source of the Material. EMBL created the Material (plasmid DNA constructs) and requires indemnity as a condition for providing a benefit and right to use their property. Given Dr. Berry’s assertions that minimal health and safety risk are posed by the Material itself, as well as confirmation that her UH staff are trained on proper handling of the Material, and that no non-university staff will be given access to the Material by UH, the potential for liability under the MTA is therefore deemed minimal.

For these reasons, Board of Regents’ approval of the indemnification language in the EMBL MTA is requested.

B-1 Personnel Actions.

UNIVERSITY OF HAWAI'I AT MĀNOA

Faculty

BAKER, BARRY JOHN
Professor
School of Architecture
Emeritus
Upon Board Approval

UNIVERSITY OF HAWAI'I AT HILO

Faculty

GERSTING, JUDITH LEE
Professor
College of Arts and Sciences
Emeritus
Upon Board Approval

GERSTING JR., JOHN M.
Professor
College of Arts and Sciences
Emeritus
Upon Board Approval

Recommendation: That the Board approve the personnel actions as recommended.

M.R.C. Greenwood
President

- B-2 Pursuant to Act 6, Special Session 2008 (SB 2263), the following proposed compensation actions for excluded executives are disclosed for purposes of public comment.

UNIVERSITY OF HAWAI'I AT MĀNOA

Executive

COX, LINDA J.
Interim Associate Dean for Academic Affairs
College of Tropical Agriculture and Human Resources
Appointment
\$12,168 per month
Salary Adjustment
\$11,438 per month
December 1, 2009

MURATA, NATHAN M.
Interim Associate Dean
College of Education
Appointment
\$11,172 per month
Salary Adjustment
\$10,502 per month
January 1, 2010

COMMUNITY COLLEGES

Executive

KINCAID, RAMONA
Interim Vice Chancellor for Academic Affairs
Kaua'i Community College
Appointment
\$8,488 per month
Salary Adjustment
\$7,938 per month
January 1, 2010